No. 97-1147 (8)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA,

Petitioner,

—v.—

WAYNE THOMAS CARTER and
MELVIN JOHNS,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE MINNESOTA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE MINNESOTA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The Minnesota Civil Liberties Union is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many Fourth Amendment cases. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. Composed of more than 9,000 attorneys and 28,000 affiliate members in 50 states, NACDL is recognized by the American Bar Association as an affiliate organization. It also has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

Around 8:00 p.m. on May 15, 1994, an anonymous and previously unknown informant told police officer Jim

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Thielen that people were sitting in an apartment "bagging" a white powdery substance. The informant identified the premises and also told Thielen that the occupants had driven a blue four-door Cadillac with Illinois license SGD 896.[2] J.A. A8.

Based solely on this tip, Thielen decided to investigate. He left the common walkway and entered a grassy area near the ground-level window of the suspected apartment. He then walked behind some short bushes in front of the window and stood approximately 12 to 18 inches from the window. Although the window blinds were closed, Thielen looked through gaps in the blinds to see what was going on inside the apartment. He observed three persons, two males and a female, near a kitchen table. The males were placing a white powdery substance into plastic bags; the female was sealing the bags. *Id.* at A9.

After watching the conduct inside the apartment for nearly 15 minutes, Thielen had another conversation with the informant who indicated, for the first time, that there might be a gun inside the apartment. Thielen then called the South Metro Drug Task Force. He was instructed to stop and secure the Cadillac if anyone attempted to move it. Around 10:30 p.m. two males, later identified as respondents Carter and Johns, drove the Cadillac out of the parking lot, when it was immediately stopped by the police, who saw a weapon on the floor. Respondents were arrested and the Cadillac was towed to a police station. A subsequent search of the car pursuant to a warrant disclosed cocaine.

[2] It is not clear how the informant knew which car respondents had used if, as the Minnesota Supreme Court opinion suggests, the respondents were already in the apartment when they were observed by the informant.

The police then returned to the apartment, and arrested Kimberly Thompson, the lessee of the premises. The following day the police executed a search warrant and found cocaine residue in the apartment. *Id.* at A9-10.

Respondents' motion to suppress the evidence seized from the apartment and the car was denied by the trial court. Specifically, the trial court ruled that respondents lacked standing to contest the search because respondents did not live in the apartment, they were not overnight guests, and neither was related to the lessee. The trial court also ruled that no search had occurred under the Fourth Amendment because Thielen was standing on a common walkway when he peered through the closed blinds into the apartment. *Id.* at E7, E10. Respondents were later convicted and sentenced on narcotics charges.

Both convictions were ultimately reversed by the Minnesota Supreme Court. First, it ruled respondents had standing to contest Thielen's search. As the court explained, society "recognize[s] as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity." *Id.* at A18.

Second, the Minnesota Supreme Court ruled Thielen's conduct was a search under the Fourth Amendment. Without deciding whether Thielen stood in a common area that was outside of the curtilage of the apartment, the court rejected petitioner's argument that Thielen's lawful presence determined whether his observation was a search. Instead, the court stressed that, by climbing over bushes and positioning his face within 12 to 18 inches of the window to peer through gaps in the closed blinds, Thielen had taken "extraordinary measures" to look inside a private home. *Id.* at A22. For that reason, the court held, Thielen's conduct was a search under the Fourth Amendment. Because neither

warrant nor probable cause authorized the intrusion, the search was unreasonable. *Id.* at A23-24.

This Court granted the petition for a writ of *certiorari* to decide two questions: First, does an invitee into a home enjoy a legitimate privacy interest under the Fourth Amendment when his connection to the premises is to assist the homeowner in criminal conduct? Second, is unaided observation of a home which occurs in a public place outside of the curtilage a search under the Fourth Amendment?

SUMMARY OF ARGUMENT

The state's approach to this case rests on a view of the Fourth Amendment that is simple, but wrong. Searching for a bright-line rule, petitioner argues that a house guest never has standing to challenge the unconstitutional search of a home unless the guest is staying overnight. The Court has consistently rejected such *per se* rules in the Fourth Amendment context, insisting instead on "a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). *See Minnesota v. Olson*, 495 U.S. 91, 95 (1990). Moreover, in making that determination, this Court has examined the historic traditions and modern norms recognized by society. *See id.*

Applying those understandings here, there is abundant support for the Minnesota Supreme Court's conclusion that guests and invitees have a legitimate expectation of privacy while in the home of their hosts. The practice of inviting visitors into one's home was prevalent in colonial society and remains an important feature of modern life. The home is a place where families and friends congregate, and guests and visitors share private moments. Its privacy is explicitly protected by the text of the Fourth Amendment.

In addition, petitioner's contention that visitors lack any expectation of privacy unless they stay overnight is inconsistent with *Alderman v. United States*, 394 U.S. 165 (1969), which recognizes that house guests are protected by a right of conversational privacy. Just as it is reasonable for house guests to assume that their conversations will not be monitored by uninvited ears, it is equally reasonable for those same house guests to assume that their behavior will not be monitored by uninvited eyes. Nothing in *Alderman* suggests that these fundamental Fourth Amendment freedoms turn on the duration of the house guest's visit.

Furthermore, the criminal nature or purpose of one's conduct is irrelevant when determining the existence of a legitimate privacy interest in a home. Expectations of privacy in a home do not ebb and flow depending upon what police find (or hope to discover) through their intrusion. Nor can privacy interests in a home be measured by whether a visit is brief and limited. The sense of security and physical integrity of a home is rendered meaningless when a person on a brief visit is denied protection against arbitrary police intrusions, but an overnight visit by that same person is granted protection against unlawful intrusions.

On the merits, the Minnesota Supreme Court was correct in holding that Officer Thielen's observations constituted a search under the Fourth Amendment. Petitioner argues that whether Thielen's observation constituted a search depends on the precise location where he was standing and whether he used a sophisticated surveillance device. Under this Court's holdings, however, neither of these factors is controlling when defining one's privacy interest in a home. Thielen's snooping violated the Fourth Amendment because it exposed the intimate details associated with use of the home to police inspection without a warrant.

ARGUMENT

I. RECOGNIZING THAT GUESTS AND INVITEES HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN A HOME IS CONSISTENT WITH THE TEXT, HISTORY, AND PURPOSE OF THE FOURTH AMENDMENT

The text and history of the Fourth Amendment demonstrate that a person's home is a sacred place. Early Americans viewed entry of their houses by government officers as an invasion of the sanctity of their homes. As one historian has explained:

> In 1787-88, commentators on the Constitution denounced general warrants and searches not just because they were general but because they abridged the security that houses afforded from unwelcome intrusion. That houses were castles was the most recurrent theme of those commentaries.[3]

The Fourth Amendment's condemnation of general warrants was, for that reason, originally designed to protect the privacy of the home.

> The concern with warrants, in short, embraced a concern with houses, which encapsulated still deeper concerns. The amendment's opposition to unreasonable intrusion, by warrant and without warrant, sprang from a popular opposition to the surveillance and divulgement that intrusion made possible. Open your front door, ran the argument, and the extent of federal invasion will be infinite.[4]

Consistent with history, this Court has repeatedly ruled that houses receive the most scrupulous protection under the Amendment.[5] Recognizing that a visitor has a legitimate privacy interest in the home of a host advances the textual and historic objectives of the Amendment. First, acknowledging a visitor's privacy interest reinforces the inherent right of homeowners to invite guests to share the comfort and security of their homes. And, it is consistent with a long tradition in this country of admitting visitors in the home.

That tradition has deep historical roots in this country. "Visiting was a continual pastime in slow-paced colonial society, and diaries were filled with notes of the exchange of visits." David H. Flaherty, PRIVACY IN COLONIAL NEW ENGLAND 89 (1972). In colonial New England, for example, invited guests "were warmly welcomed into the intimacy of the family." *Id.* at 92.

Moreover, individuals often relied on the hospitality of complete strangers when they traveled away from home.

> Visitors ranged from neighbors and others in the community to relatives and complete

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[3] William Cuddihy, "The Fourth Amendment: Origins and Original Meaning, 602-1791," at 1545-46 (1990)(unpublished Ph.D. dissertation, Claremont Graduate School). Justice O'Connor describes Cuddihy's scholarship as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995).

[4] Cuddihy, *supra* at 1546 (footnote omitted).

[5] *See, e.g., United States v. Karo*, 468 U.S. 705, 714-15 (1984); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984); *Payton v. New York*, 445 U.S. 573, 589 (1980); *id.* at 601 (noting the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic")(footnote omitted).

> strangers. Since they were admitted to the bosom of the family, visitors might witness some intimate activities. Such persons as Samuel Sewall, the prominent public servant, engaged in a constant round of visitations. In Westborough the minister Parkman complained that "company are here every Day, and not a few which is a great Interruption to me." In Boston John Andrews, a merchant, boasted of his wife's "friends which are not a few, I do assure you, as Lord North has scarcely a greater Levee than she, especially in pleasant weather; its quite common for her to have from six to ten visitors of a forenoon."

Id. at 89-90.

In short, the practice of inviting guests or visitors into a home was an established social custom by the time the Fourth Amendment was ratified. Recognizing a visitor's privacy interest in a home thus "preserve[s] that degree of respect for the privacy of persons and the inviolability of their [homes] that existed" when the Fourth Amendment was adopted. *Minnesota v. Dickerson*, 508 U.S. __, __, 113 S.Ct. 2130, 2139 (1993)(Scalia, J., concurring).

It is also consistent with the underlying purpose of the Fourth Amendment. As this Court has repeatedly stated: "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586 (footnote omitted). The requirement that police obtain a judicial warrant before intruding into a home was not intended to shield criminals or probative evidence from the lawful reaches of officers. Rather, "[t]he warrant requirement . . . is imposed to protect the home." *Harris v. New York*, 495 U.S. 14, 20 (1990); *id.* at 17 (the rule of *Payton* "was designed to protect the physical integrity of the home"). If a warrantless search of a home subverts the physical integrity of the home even when the homeowner is absent,[6] then a similar search is equally destructive of the home's physical integrity when an invitee is sharing the privacy and security of the home. Petitioner's claim that an invitee has no privacy interest in a home ignores the benefits and value -- for both homeowner and visitor -- of having visitors in a home. In sum, the presence of a visitor within a home in no way diminishes the sanctity of the home against police intrusions that are otherwise *per se* unreasonable under the Fourth Amendment.

Here, Officer Thielen's scrutiny of Thompson's home had all of the traits of an unreasonable search which invaded respondents' privacy expectations.[7] No warrant authorized

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[6] *See Payton*, 445 U.S. 573 (warrantless entry to arrest Payton violates the Fourth Amendment even though Payton was absent at the time of the entry).

[7] Officer Thielen's conduct would have impaired the privacy expectations of early Americans. Professor Flaherty notes that:

> Eavesdroppers and Peeping Toms also threatened the privacy of a home. Such offenders were not often prosecuted, since the matter could be handled in a more practical and perhaps more satisfying manner by the person who discovered the culprit . . . . Peeping Toms were similarly held up to ignominy at law. A New Haven Man won a slander and defamation suit against a fellow citizen who had accused him of coming "in the night to peep in at his window." John Severns of Salisbury entered a complaint against two young men in 1680, "for hovering about his house, peeping in at the window." Although their intention was probably to entice his servants out of the house, Severn's ideas about privacy obviously did not include such liberties.

Flaherty, *supra* at 89 (footnotes omitted).

Thielen's search, there was no probable cause for the intrusion, Thompson did not consent to the search, and no exigency justified Thielen's conduct. In other words, Thielen's snooping undermined the integrity of the home for both Thompson and her visitors. Having visitors in the home did not lessen the unreasonableness of Thielen's search.

Furthermore, Thielen's conduct jeopardized the societal interest in protecting the privacy of homes against unreasonable intrusions. As in the case of overnight guests, society has a legitimate interest in ensuring that short-term guests are protected against unreasonable searches and seizures. "We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." *Olson*, 495 U.S. at 98. The logic that recognized that an overnight guest has a legitimate expectation of privacy in the home equally applies to short-term guests.[8] That the visitor lacks ultimate control over the home is unimportant; the crucial "point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Id.* at 99.

[8] *Olson*, 495 U.S. at 96 (rejecting the state's multi-factor test for deciding whether an overnight guest has a sufficient nexus with a home to enjoy constitutional protection, and finding "Olson's status as an overnight guest is alone enough to show that he had an expectation privacy in the home that society is prepared to recognize as reasonable"); *see also United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997)("*Olson* stands for the proposition that any guest, in appropriate circumstances, may have a legitimate expectation of privacy when he is there 'with the permission of his host, who is willing to share his home and his privacy with his guest'")(quoting *Olson*, 495 U.S. at 99).

II. DENYING GUESTS PRIVACY INTERESTS IN A HOME CONTRADICTS THE PRINCIPLE THAT ALL PERSONS HAVE A RIGHT OF CONVERSATIONAL PRIVACY WHILE IN THE HOME OR OFFICE OF ANOTHER PERSON

Alderman v. United States, 394 U.S. at 176, made clear that a violation of the Fourth Amendment occurs when government officials "unlawfully overhear[] conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations."[9] *Alderman*'s ruling that a defendant could contest the illegal monitoring of his conversations that occurred on another's premises was the inevitable extension of the rule announced in *Katz v. United States*, 389 U.S. 347 (1967), that conversational privacy is protected by the

[9] In a footnote, *Alderman* stated that "[t]hose who converse and are overheard [by illegal electronic surveillance] when the owner is not present also have a valid objection unless the owner of the premises has consented to the surveillance." *Id.* at 179, n.11. *Alderman*'s ruling on the standing of a defendant to contest illegal wiretapping or eavesdropping that monitors his conversation while in the home or office another person paralleled the holding in *Silverman v. United States*, 365 U.S. 505 (1961)(right to be secure in a home violated when petitioners' conversations were overheard by "spike" microphone that invaded the walls of private premises), and reflected the earlier views of Justices Harlan and White. *See Berger v. New York*, 388 U.S. 41, 103 (1967)(Harlan, J., dissenting)("I would conclude that, under the circumstances here, the recording of a portion of a telephone conversation to which petitioner was a party would suffice to give him standing to challenge the validity under the Constitution of the [eavesdropping device installed in another person's office]"); *id.* at 107 (White, J., dissenting)("Since Berger was rightfully in Steinman's office when his conversations were recorded through the Steinman eavesdrop, he is entitled to have those recordings excluded at his trial if they were unconstitutionally obtained").

Fourth Amendment. No precedent since has questioned this aspect of *Alderman*.

The petitioner, however, insists that respondents have no expectation of privacy against the police surveillance *sub judice*. Petitioner has not asked that *Alderman* be reconsidered. Thus, under petitioner's analysis, if either respondent had used Thompson's telephone to discuss acquiring cocaine and an illegal wiretap recorded their conversations, or if an unlawfully installed eavesdropping device in Thompson's kitchen had captured respondents' conversations concerning narcotics, the respondents' legitimate expectations of privacy would have been infringed, and *Alderman* would have required the fruits of these unlawful searches and seizures to be excluded from respondents' trial. *Alderman*, 394 U.S. at 176-77. But here, petitioner argues, Thielen's search caused no constitutional harm to respondents because they lacked an expectation of privacy in Thompson's home. In effect, petitioner proposes a constitutional rule that protects respondents' conversations while in a home from unlawful intrusions, but not their private acts in that same home.

This argument ignores *Alderman*. Whether respondents have an expectation of privacy in a home cannot turn on a distinction between conduct and conversation. *See id.* at 179-80 (when assessing a homeowner's privacy interest, there is no difference between a police entry of a home to install a listening device and a traditional police entry to view or seize tangible property). As *Alderman* explained, the holding in *Katz* was not "intended to withdraw any of the protection which the [Fourth] Amendment extends to the home or to overrule the existing doctrine, recognized at least since *Silverman*, that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home." *Alderman*, 394 U.S. at 180.

Petitioner's position not only disregards the teaching of *Alderman*, it is bad constitutional law because no neutral principle justifies a different result depending upon whether police conduct monitors private conduct in the home rather than private conversation. Nor has this Court ever recognized such a distinction when defining expectations of privacy. Thus, the Court has recognized that the Fourth Amendment protects "against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects,'" *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). But the Court has also recognized that the Fourth Amendment bars testimony of activities observed by police officers during an unlawful invasion of a home. *Id. See also McDonald v. United States*, 335 U.S. 451 (1948) (excluding evidence that officers discovered after climbing through landlady's window of roominghouse and standing on a chair in a hallway to look through the transom of defendants' room). Because a visitor's privacy interest in a home parallels the privacy interest a visitor has when using the telephone of a host or while conversing inside the home of a host, the ruling below properly recognized respondents' right to contest Thielen's search.

A. The Criminal Nature Of A Visitor's Conduct Is Irrelevant When Determining Whether The Visitor Has A Legitimate Privacy Interest In A Home

Petitioner insists that respondents "seek Fourth Amendment protection for their illegal activities in the apartment of a co-conspirator." Brief for Petitioner at 14. According to petitioner, because the Fourth Amendment was not designed to protect criminal conduct, the nature of a defendant's activity "is worthy of inquiry" when determining whether he may claim Fourth Amendment protection. *Id.* at 22-23.

Petitioner is wrong. First, the court below did not rule, as suggested by petitioner, that criminal conduct in concert with a host is enough to confer standing. Brief for Petitioner at 9, 16-20. Nor did it find that society is willing to accept drug dealing as reasonable behavior. The Minnesota Supreme Court merely found that respondents had a sufficient nexus with Thompson's residence to contest police surveillance that disclosed private conduct within a home.

Petitioner's description of Fourth Amendment law is also mistaken. Petitioner cites no precedent supporting its assertion that the criminal nature of one's conduct is relevant for determining whether a defendant possesses a privacy interest in a home. In fact, a similar argument was rejected in *United States v. Jeffers*, 342 U.S. 48 (1951), a case not cited by petitioner. In *Jeffers*, the government claimed that, because of its contraband nature, Jeffers had no standing to object to the seizure of narcotics taken during a warrantless search of his hotel room. *Id.* at 52-53. *Jeffers* dismissed this argument. It explained that Congress' authority to abrogate property rights in narcotics was not intended to undermine the ability of criminal defendants to assert legitimate Fourth Amendment claims when police unlawfully invade their privacy. *Id.* at 53-54. *See also Chapman v. United States*, 365 U.S. 610 (1961)(finding that, even when a house is used for the sole purpose of distilling contraband whiskey, tenant retains privacy interest against forcible police entry and search authorized by landlord).

If petitioner's theory is correct that the criminal nature of a defendant's activity is relevant when measuring one's Fourth Amendment standing, then guilty people would never have standing.[10] More importantly, this Court has repeatly ruled that expectations of privacy do not depend on whether the police expect to find (or do discover) criminal evidence as a result of their search. For example, in *Katz*, FBI agents had good reason to believe that Katz was using the telephone to place illegal wagers. Their warrantless wiretap was limited to the specific purpose of establishing the illegal nature of Katz' telephone conversations. Thus, even though FBI agents had probable cause to believe that Katz was engaged in "conversational contraband" at the time of their surveillance, this fact was inconsequential for determining whether Katz could justifiably rely on the privacy of the telephone booth he was using. *Katz*, 389 U.S. at 351-53.

Similarly, in *Olson*, when deciding whether an overnight guest had sufficient interest in a home to contest a warrantless entry for his arrest, this Court did not focus upon the circumstances of the defendant's visit to the home. Had the Court done so, it might have noted Olson's status as a person who evaded lawful authority, a crime in Minnesota.[11] In *Olson*, as in *Katz* and *Rakas*, the criminal nature of the defendant's conduct or purpose was immaterial in resolving whether the police intrusion violated a legitimate expectation of privacy. This is as it should be because the "guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike." *McDonald*, 335 U.S. at 453; *Trupiano v. United States*, 334 U.S.

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[10] *Cf.* 5 Wayne F. LaFave, SEARCH AND SEIZURE §11.3(b), 144 (3d ed. 1996)(noting that, although a few lower courts have denied standing if (continued...)

[10] (...continued)
the defendant's "presence was for the purpose of engaging in criminal conduct . . . or . . . to avoid detection or capture by the police," the correct view "is to the contrary, for to deny standing merely because it turns out the defendant had a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule").

[11] *See* Minn. Stat. §609.487(3) (1981)(fleeing a peace officer in a motor vehicle). This Court assumed that probable cause existed for Olson's arrest. 495 U.S. at 95, n.1.

699, 709 (1948)("The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement").

Rules that govern searches and seizures are based on objective facts and standards, not subjective motives or what is ultimately discovered by the police. Thus, the Court has noted that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. DiRe*, 332 U.S. 581, 595 (1948)(footnote omitted). Expectations of privacy are measured in a similar fashion. "Expectations are formed on the basis of objective appearances, not on the basis of facts known only to others . . . . The [person's] expectation of privacy is either inherently reasonable or it is inherently unreasonable." *United States v. Karo*, 468 U.S. at 724 (O'Connor, concurring in part and concurring in the judgment). Accordingly, the court below correctly ignored respondents' criminal acts when deciding whether they had a legitimate expectation of privacy in a home.

B. There Is No Principled Reason For A *Per Se* Rule That Denies A Visitor Privacy Interests In A Home, While Protecting The Same Privacy Interests Of An Overnight Guest

Petitioner submits that "[v]isitors cannot rely upon their host's privacy interest in a residence to establish a protected privacy interest under the Fourth Amendment." Brief for Petitioner at 11. The United States, as *amicus curiae*, argues that, when a person's connection with a place is "only brief and limited, he lacks a socially recognized interest in maintaining the privacy of that place." Brief of United States at 17.

The arguments of petitioner and its *amici* misconstrue this Court's Fourth Amendment rulings since the seminal case of *Katz v. United States*. They propose a *per se* rule that excludes visitors from relying on the protection traditionally afforded by the home under the Fourth Amendment. They emphasize that visitors generally, and respondents specifically, cannot claim a property interest in their host's home because they exercise no dominion or control over it. *See* Brief of Petitioner at 14; Brief of United States at 19. But, just as *Katz* "liberates courts from the trespass straightjacket" when determining whether a police intrusion triggers constitutional scrutiny,[12] this Court's subsequent cases have rejected talismanic formulas for determining the scope of the Fourth Amendment's coverage.[13]

A homeowner's "sense of security," *United States v. White*, 401 U.S. 745, 786 (Harlan, J., dissenting), is undeniably damaged when a police officer is discovered peeking through the closed blinds of a bedroom or kitchen window. Similarly, when visitors are invited to enjoy the privacy and security of another's residence -- for example, when a

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[12] LaFave, *supra*, §2.3(c) at 492.

[13] *See, e.g., United States v. Padilla*, 508 U.S. 77, 78 (1993)(rejecting co-conspirator test for deciding who may contest the lawfulness of a search or seizure); *Olson*, 495 U.S. at 99 (right to exclude is not determinative of an overnight guest's privacy interest in a home); *Rakas*, 439 U.S. at 147 (rejecting "blind adherence to a phrase [*i.e.*, legitimately on the premises] which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment"). *Cf.* Anthony G. Amsterdam, "Perspectives On The Fourth Amendment," 58 Minn.L.Rev. 349, 385 (1974)("In short, the common formula for *Katz* fails to capture *Katz* at any point because the *Katz* decision was written to resist captivation in any formula").

neighbor is asked to share a cup coffee inside a host's kitchen to discuss family matters, or when a college student is invited to a classmate's dormroom to provide advice on school or dating -- the visitor does not expect to be spied upon by officers peeking through the gaps of closed blinds. Put another way, the visitor reasonably anticipates that his privacy and security "will not be disturbed by anyone but his host and those his host allows inside." *Olson*, 495 U.S. at 99; *see also Mancusi v. DeForte*, 392 U.S. 364, 369 (1968)(union member's privacy interest in office is not compromised by the fact that he shared office with other members).

The United States, as *amicus*, proffers a distorted view of constitutional and societal norms when it states that "one who merely visits the home of another and does not stay there overnight ordinarily arrives without any expectations regarding the admission or exclusion of others." Brief of United States at 17. First, there is no evidence in this case that Thompson extended such invitations during respondents' stay in her home.[14] Moreover, Thompson surely did not consent to Officer Thielen's snooping. Thus, the fact that Thompson was "free to admit or exclude others," Brief of United States at 17-18, is beside the point.

Second, this Court has recognized a critical (and constitutional) difference between a nonconsensual police intrusion and a consensual intrusion by private parties not affiliated with the government. *See Marshall v. Barlow's, Inc.*,

[14] *See DeForte*, 392 U.S. at 369-70 (union official's standing is not affected by the possibility that his superiors might have consented to a search of the office, regardless of DeForte's wishes, because "it is not claimed that any such consent was given, either expressly or by implication").

436 U.S. 307, 314-15 (1978). The latter "furnishes no justification for federal agents to enter a place of business from which the public is restricted [in order to] to conduct their own warrantless search," *id.* at 315 (footnote omitted). Likewise, a visitor's expectation that private acts in a home will not be subject to police surveillance is unaffected by the ability of the host to invite others inside.

Third, expectations of privacy are assessed in qualitative, and not quantitative, terms. *See Arizona v. Hicks*, 480 U.S. 321, 325 (1987)("A search is a search, even if it happens to disclose nothing but the bottom of a turntable"). That is why even a brief and single use of a telephone entitles a person to assume that "the words he utters into the mouthpiece will not be broadcast to the world." *Katz*, 389 U.S. at 352. The same qualitative analysis should apply when determining the privacy interests of visitors in a home: one's entitlement to constitutional protection should not depend on the length of a visit or whether one stays until the sun rises. For instance, under the formulaic analysis of petitioner and its *amici*, a homeowner's sexual partner would have no expectation of privacy unless he spent the night and no standing to object if the police peered through the closed blinds of a bedroom window.

The privacy protections of the Fourth Amendment are not so ephemeral. As this Court has observed, "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *Karo*, 468 U.S. at 714.

III. NONCONSENSUAL POLICE SURVEILLANCE THAT REVEALS INTIMATE DETAILS OF A HOME IS A SEARCH UNDER THE FOURTH AMENDMENT

Petitioner argues that Officer Thielen's observation was not a search under the Fourth Amendment because it was "made from a location in a common area outside of the curtilage without the use of sophisticated surveillance devices." Brief for Petitioner at 32. The United States, as *amicus*, shares this view and argues that even when officers view objects inside a home, there is no search as long as their observations take place outside the curtilage in an area accessible to members of the general public. Brief of United States at 25. This Court, however, has never endorsed the *per se* rule that a police officer's unaided observation of a home from a lawful location is, by definition, outside the scope of the Fourth Amendment.

A. A Majority Of The Court Has Rejected The Notion That The Privacy Interest Associated With A Home Is Always Unreasonable If Surveillance Occurs From A Location Where An Officer Has A "Right To Be"

Florida v. Riley, 488 U.S. 445 (1989), is the Court's most recent precedent concerning expectations of privacy where police scrutinize an area surrounding the home. Petitioner and its *amici* read *Riley* to stand for the rule that unaided observation of a home from an area open to the public is not a search. This reading of *Riley* is mistaken.

In *Riley*, Justice White's plurality opinion held that helicopter surveillance of a greenhouse, which was located within the curtilage of Riley's home, was not a search because Riley "could not reasonably have expected that his greenhouse was protected from public or official observation from

a helicopter had it been flying within navigable airspace for fixed-wing aircraft." *Id.* at 450-51. Under petitioner's view of *Riley*, expectations of privacy turn on the *location* of an officer. Brief for Petitioner at 30. The problem for petitioner, however, is that a majority of the Court has never endorsed this explanation of *Riley*. Rather, a majority of the *Riley* Court expressly rejected the claim that privacy interests in a home can be defeated if surveillance occurs from a place where an officer has a "right to be."[15] Thus, the court below properly rejected petitioner's argument that Thielen's location was dispositive of whether his observation constituted a search under the Fourth Amendment.

Moreover, petitioner ignores the narrowness of even the plurality opinion in *Riley*. Justice White specifically noted that "we would have a different case" if the helicopter surveillance at issue had been contrary to law or regulation. *Id.* at 451. Here, it is at least arguable that Thielen's conduct violated Minnesota's window-peeping law.[16] In addi-

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[15] *See Riley*, 488 U.S. at 454 (O'Connor, J., concurring)("In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *[California v. Ciraolo*, 476 U.S. 207 (1986)], is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial surveillance was not 'one that society is prepared to recognize as reasonable'")(quoting *Katz*, 389 U.S. at 361); 488 U.S. at 464-65 (Brennan, J., dissenting)("the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations," but rather whether Riley's expectations were defeated by the extent of public observation from aerial observation at 400 feet); *id.* at 467 (Blackmun, J., dissenting)(same).

[16] *See* Minn. Stat. §609.746 (1996)(interference with privacy):

> Any person who enters upon another's property and surrepti-

(continued...)

tion, five of the Justices in *Riley* were careful to disavow the notion that police, once lawfully positioned, have *carte blanche* to monitor the curtilage of one's home.[17] If the police do not have a blank check to monitor the curtilage of one's home from the air, petitioner's theory that officers are completely free to scrutinize the *interior* of a home while standing within inches of a window is implausible.

The *Riley* plurality also acknowledged that the helicopter observation in that case did not interfere with the normal use of the greenhouse or other parts of the curtilage and, most importantly, "no intimate details connected with the use of the home . . . were observed." *Id.* at 452.[18] Of course, the same cannot be said of Officer Thielen's observation. Unlike the airborne inspection upheld in *Riley* and *California v. Ciraolo*, 476 U.S. 207 (1986), and in sharp contrast to the police activities approved in *Dunn* (no Fourth Amendment violation when police trespassed upon property and, while standing outside of the curtilage, looked into defendant's barn), Thielen's surveillance *did* open to police inspection the "intimate details connected with the use of the home." *Riley*, 488 U.S. at 452. This is the critical facet of respondents' case and distinguishes it from the facts in *Riley*, *Dunn*, *Ciraolo*, and *Oliver v. United States*, 466 U.S. 170 (1984)(no search occurred when police entered defendant's "open fields").

Simply put, this Court has never permitted nonconsensual police surveillance that reveals the intimate details of a home to be free of constitutional restraints,[19] even when the

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[16] (...continued)
tiously gazes, stares, or peeps in the window of a house or place of dwelling of another with intent to intrude upon or interfere with the privacy of a member of the household thereof is guilty of a misdemeanor.

The United States ignores this aspect of *Riley*. It contends, citing *United States v. Dunn*, 480 U.S. 294, 297-98, 304 (1987), and *California v. Greenwood*, 486 U.S. 35, 44 (1988), that state law concepts of privacy do not control the existence of expectations of privacy under the Fourth Amendment. Brief for United States at 25, n.6. Although we agree with Justice O'Connor's view that police compliance with statutory and regulatory law alone should not determine whether a particular intrusion violates interests protected by the Fourth Amendment, *see Riley*, 488 U.S. at 453 (O'Connor, J., concurring in judgment)(citations omitted), there may be instances where state law or other governmental regulations may assist the Court in determining the scope of a particular interest protected by the Amendment. *See Rakas*, 439 U.S. at 143, n.12 ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society").

Because the *Riley* plurality thought "it is of obvious importance that the helicopter in th[at] case was *not* violating the law," 488 U.S. at 451 (emphasis in original), petitioner and its *amici* cannot now, when discussing the meaning of *Riley*, ignore an aspect of the case that a plurality of the Court deemed important for determining privacy interests under the Fourth Amendment.

[17] *See* 488 U.S. at 451 ("This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within navigable airspace specified by law"); *id.* at 454 (O'Connor, J., concurring)("The fact that a helicopter could conceivably observe the curtilage at virtually any altitude or angle, without violating FAA regulations, does not in itself mean that an individual has no reasonable expectation of privacy from such observation").

[18] *See also Dow Chemical Co. v. United States*, 476 U.S. 227, 237 n.4 (1986)(emphasis in original)(upholding aerial observation of industrial plant, but finding "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened. Nor is this an area where Dow has made any effort to protect against aerial surveillance").

[19] *Cf. Karo*, 468 U.S. at 716 ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a (continued...)

police position themselves just outside the curtilage.[20] The

[19] (...continued)
threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight")(footnote omitted).

[20] The United States, as *amicus*, recognizes that the court below chose not to resolve whether Thielen's observation occurred while inside the curtilage of Thompson's residence, and does not urge this Court to revisit this "fact-intensive determination, which did not form the basis for the ruling below." Brief for United States at 27, n.7. Nevertheless, the United States insists that the lower Minnesota courts correctly found -- relying on the four-factor test of *Dunn*, 480 U.S. at 301 -- that Thielen's observation occurred beyond the curtilage. It also agrees with the view expressed by some lower federal courts "that common areas surrounding garden apartments do not harbor the 'intimate activity' associated with the home," and thus cannot be considered curtilage under the Fourth Amendment. Brief for United States at 27, n.4 (citations omitted).

The United States is wrong to suggest that all curtilage questions are to be resolved by the four-factor test announced in *Dunn*. *See* 480 U.S. at 301 ("We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions"). *Dunn* itself noted that the four factors it considered were the proper analytical tools "only to the degree that, in any given case, they bear upon the centrally relevant consideration -- whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

Moreover, the extent of an apartment dweller's curtilage endorsed by the United States is unduly cramped. We agree with the views recently expressed by several judges of the Seventh Circuit that apartment dwellers' curtilage should be defined in a manner that protects their privacy from peeping-tom police officers. *See United States v. Redmon*, 138 F.3d 1109, 1128 (7th Cir. 1998)(*en banc*)(Evans, J., concurring)("In a townhouse complex . . . the curtilage is a bit wider. It includes the garage itself and those areas close to the living unit, particularly places where prying eyes can peer into windows"); *id.* at 1130 (Posner, C.J., dissenting)("The curtilage would rarely extend beyond the house itself if complete, opaque enclosure were required . . . . Most homeowners ex-

(continued...)

location of Thielen's feet cannot and should not be critical. What is critical is that Thielen chose to peer into a private home through gaps in the closed blinds. In doing so, he violated the Fourth Amendment's essential protection, which is "the right to be let alone" from arbitrary and discretionary monitoring by the police. *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).[21]

[20] (...continued)
tend an implicit invitation to social and business invitees to walk up to the front door, but in doing so the homeowner does not, as it were, 'waive curtilage.' The social and business invitee, including a police officer whether invited or uninvited, must confine himself to the prescribed route, rather than treating the invitation as one to roam the property at will, peering into the windows of the home"); *id.* at 1133 (Manion, J., dissenting)("When crossing the property line [of a townhouse] without a warrant . . . , police should be required to overcome the presumption that the property line defines the perimeter of the curtilage where an owner's expectation of privacy begins"); *id.* at 1135 (Rovner, J., dissenting)("I submit that most urban dwellers would be shocked to learn that the portion of a driveway immediately adjacent to the garage door is consider by this court to be an 'open field,' rather than a part of the 'area around the home to which the activity of home life extends'")(citation omitted). If the United States is correct that the location where Officer Thielen peered into Thompson's window is not part of the curtilage of her residence -- "if it is to be classified as an 'open field' -- then no place outside [her] house was within the curtilage, and, indeed, attached houses, row houses, and other cramped urban dwellings have no curtilage (beyond the house itself); curtilage is confined to farmers and to wealthy suburbanites and exurbanites." *Id.* at 1132 (Posner, C.J., dissenting). If this is the law, then "it is hard to imagine a circumstance wherein police will need a warrant short of entering the house itself." *Id.* at 1133 (Manion, J., dissenting).

[21] *See McDonald v. United States*, 335 U.S. 451 (Fourth Amendment violated due to warrantless observation of tenants' room; no significance given to the fact that officer was in the hallway of a roominghouse -- a "common area" -- when he observed private acts inside tenants' room).

B. One's Privacy Interest In A Home Is Not Lost When Intimate Details Are Revealed By Unaided Observations

Petitioner stresses that Officer Thielen's observation of the home was unaided by sophisticated surveillance devices. Although the use of sophisticated surveillance equipment may compromise a legitimate privacy interest, the existence of a privacy interest *ab initio* does not depend upon whether the police employed such equipment. Respondents' privacy interests emanate from their status as guests in a home and from the steps taken to ensure that their private acts within the home would not be revealed to persons outside. Just as the lack of a physical trespass is irrelevant in determining one's conversational privacy, *see Katz*, 389 U.S. at 353, one's privacy in a home does not turn on whether an officer's scrutiny of intimate details inside a home was obtained by conventional methods of surveillance.

Nor should it matter that respondents' private acts were observable by someone peeping through gaps of closed blinds. Concededly, behavior inside a home is not accorded constitutional protection if an officer notices conduct while on the walkway or street near a home.[22] People who do not take sensible precautions to ensure their seclusion "cannot reasonably expect privacy from public observation." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring). But the Court has never required that individuals enclose themselves in sealed and impenetrable houses to guarantee privacy. Reasonableness is the touchstone of Fourth Amendment norms and, in the context of a home, expectations of privacy are established when reasonable methods are taken to avoid

[22] *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection").

disclosing intimate details to passersby.[23] "To require individuals to completely cover and enclose their curtilage [and homes] is to demand more than the 'precautions customarily taken by those seeking privacy.'" *Id.* (quoting *Rakas*, 439 U.S. at 152 (Powell, J., concurring)). Here, by situating themselves inside premises with closed window blinds, respondents took reasonable methods to ensure their privacy.

To rule that the window-peeping is not a "search" under our Constitution signals "a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box." *Lorenzana v. Superior Court*, 511 P.2d 33, 41 (Ca.Sup.Ct. 1973). This Court's Fourth Amendment rulings do not require such a drastic result.

[23] *Id.* ("Individuals who seek privacy can take precautions, tailored to the location of the road, to avoid disclosing private activities those who pass by").

CONCLUSION

For the reasons stated above, the judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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